

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 856 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI

and

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

MANGABHAI KAGDIYABHAI RATHVA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 856 of 1995
MRS SHILPA J UNWALLA for Petitioner No. 1 & 2
None present for for Petitioner No. 3-4
Mr K C Shah, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI

and

HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 22/01/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

The appellants-original accused in Sessions Case
No.21/94 have preferred this appeal under sub-section (2)

of section 374 of the Criminal Procedure Code, 1973 (for short, 'the Code') in order to challenge the judgment and conviction order dated 21.7.1995 recorded by the learned Addl. Sessions Judge, Vadodara, Camp at Chhota Udepur, in the aforesaid sessions case convicting the present appellants for an offence punishable under section 302 of IPC and sentencing them to suffer imprisonment for life.

2. The appellants were also convicted for an offence punishable under section 326 read with section 34 of IPC and they have been sentenced to suffer R.I. for one year for the said offence. The appellants have been further convicted for an offence punishable under section 37 (1) read with section 135 of the Bombay Police Act and they have been sentenced to suffer S.I. for four months. However, no fine has been imposed on the appellants. The facts of the case of the prosecution against the appellants may be briefly stated as follows:

3. The present incident took place on 30.8.1993 at 17.00 hours at village Bhuriakuva. As per the case of the prosecution, the father of the complainant had purchased a piece of land from the predecessor-in-title of the appellants before about 20 years. On account of the said transaction of sale and purchase, there was some dispute between the family of the complainant and the family of the appellants regarding ownership and possession in respect of the said land. It has come on record that even Chapter cases were filed against both the groups.

4. So far as the present incident is concerned, as per the case of the prosecution, the informant-eye witness - injured and his brother - deceased Bachhubhai Karsanbhai Rathwa, both had gone to village Kwant for sale of their bullocks. It is not much in dispute that local markets are arranged on Mondays at village Kwant and people go there for sale and purchase of goods, materials etc. Accordingly, the deceased and the informant, both being real brothers, had gone to village Kwant on 30.8.1993. However, the bullocks could not be sold and, therefore, they were on their way back to their village Sedivasan. At the time when they reached Bhuriakuva village at about 5 p.m., according to the case of the prosecution, the present appellants were found hiding themselves in the surrounding area. When the two brothers were passing on the road, the appellants came out and started assaulting both of them. Out of them, the first appellant had axe with him, the second and the third appellant had dharia with them and the fourth appellant had a stick with iron ring with him at the

relevant point of time. Incidentally, it may be noted that appellants no.1, 2 and 3 are the real brothers and appellant no.4 is their father.

5. The prosecution has also alleged that injured Khimlabhai Karsanbhai was beaten by the appellants and thereafter the appellants have committed assault on deceased Bachhubhai Rathwa being the brother of the informant and the deceased was done to death and he died on the spot. On hearing the shouts the persons in the neighbourhood had run to the spot. Even the brothers of the injured and the deceased also had arrived there and after those persons had arrived there, the injured was taken to Kwant Primary Health Centre which is situated at about 7 k.m. distance. According to the prosecution, the injured eye witness had given his FIR report to the Police Sub-Inspector in the Kwant Primary Health Centre. The injured was examined and treated at the Kwant Primary Health Centre. Thereafter, it was noticed that his injuries were serious and, therefore, he was referred to a Hospital at Vadodara.

6. Deceased Bachhubhai Rathwa had received serious injuries on his person and, therefore, he died on the spot on account of the injuries sustained by him.

7. On receiving the FIR, the PSI proceeded to go to the Village of the informant. He recorded statements of witnesses at late night hours and he had drawn panchnama of the scene of offence on the next morning. It seems that the appellants presented themselves before the police station and they were arrested by the concerned police station and were brought to Kwant police station. Houses of the appellants were searched and muddamal articles were seized from the said house. After recording statements of witnesses and drawing panchnama about the inquest and scene of offence, the muddamal was recovered and report from the FSL was obtained. When the investigation was over, charge sheet was submitted before the Court concerned. Since the offence punishable under section 302 of IPC was exclusively triable by the Court of Sessions, the learned Magistrate had committed the case to the Court of Sessions where it was registered as Sessions Case No.21/94. The learned Addl.Sessions Judge, camping at Chhota Udepur, provided copies of police investigation papers to the appellants. Charge was framed at Exh.3 which was read over and explained to the present appellants. The appellants pleaded not guilty to the said charge and, therefore, evidence was recorded. In support of the aforesaid case, the prosecution has examined the following witnesses:

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1. PW 1 Himlabhai Karsanbhai Exh.9
 2. PW 2 Vestabhai Bijalbhai Exh.12
 3. PW 3 Bhimsinghbhai Karsan Exh.13
 4. PW 4 Rimjibhai Gardibhai Exh.14
 5. PW 5 Nasliben Bachhubhai Exh.15
 6. PW 6 Kaliabhai Jagadbhai Exh.16
 7. PW 7 Karsanbhai Exh.17
 8. PW 8 Dr. Ranjit Chaudhary Exh.18
of Kwant Primary Health Centre
 9. PW 9 Dr.Naranbhai Parmar Exh.22
of Vadodara Hospital
 10. PW 10 Karsanbhai Motibhai Exh.24
 11. PW 11 Karsanbhai Dalubhai Exh.33
 12. PW 12 Panch Natubhai Jaimalbhai Exh.35
(hostile)
 13. PW 13 Narsibhai Motibhai, co-panch Exh.37
(hostile)
 14. PW 14 Panch, Chamadabhai (hostile) Exh.38
 15. PW 15 Panch, Kanabhai Nayak " Exh.40
 16. PW 16 Panch, Tersinghbhai " Exh.42
 17. PW 17 PSI, Mansukhbhai Talpada,
Inv.Police Officer
Exh.44
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The prosecution have also relied upon certain documents which may be enlisted as follows:

1. Exh. 20 Injury certificate of injured Khimlabhai
2. Exh. 21 Postmortem note in respect of deceased
3. Exh. 23 Injury certificate of Khimlabhai issued by
Vadodara Hospital
4. Exh.25 Inquest panchnama
5. Exh.26 Production of clothes of deceased
6. Exh.27 Letter to FSL
7. Exh.24 FSL to PSI - Report
8. Exh.30 Village Form No. 7 and 12
9. Exh.31 Village form No.6 - record of right
- 10.Exh.32 Map of scene of offence
- 11.Exh.34 Panchnama of scene of offence
- 12.Exh.36 Panchnama regarding search of house of
appellants
- 13.Exh.39 Arrest panchnama of Jafaria and Mangabhai,
clothes - blood stained, dharia
- 14.Exh.41 Arrest panchnama other two appellants
- 15.Exh.45 FIR
- 16.Exh.46 Police station dairy entry.

On appreciation of the evidence as aforesaid, the

trial court was pleased to find the present appellant guilty for offence punishable under section 302 and 326 read with section 34 of IPC and section 37 (1) read with section 135 of the Bombay Police Act. The trial court, therefore, imposed punishment on the appellants. The said judgment and conviction order has been challenged in this appeal by the appellants.

8. In view of the above position, it would be appropriate for us to consider evidence of PW 1 - Exh.9, Khimlabhai. Evidence of this witness is not only relevant but important and material in light of the fact that the other eye witness - Karsanbhai Karpabhai has not been believed by the trial court and, therefore, informant Khimlabhai is the only witness to the incident and, therefore, his evidence is required to be considered in its proper perspectives.

9. Before we go to the appreciation of evidence of this witness, it is required to be considered that as per the say of the informant and other witnesses, there was some dispute between the appellants and the family of the informant Khimlabhai. It seems that the father of the informant had purchased a land from the predecessor-in-title of the appellants before 20 to 30 years and since then the said dispute has been going on between the two groups. There is no serious dispute about the same.

10. It is also required to be considered that even the Investigating Police Officer, PSI Mansukhbhai Talpada has also stated during the course of his evidence that there was a dispute between two groups and chapter cases were filed against both the groups. This further shows that there was a dispute about the land between the two groups.

11. It is also required to be considered that the informant has deposed at Exh.9 that in respect of the land in question, there was some quarrel between the Sarpanch of the village and the police patel of the village on the one hand and the appellants on the other hand. He has also deposed in para 16 of his evidence that the Sarpanch and the police patel both had beaten the present appellants and that they were required to be hospitalised for 10 days and there was a police complaint with respect to the said event also. This shows that even before the occurrence of the present event there was active quarrel between the two groups and it has resulted in hospitalisation of the appellants for a period not less than 10 days.

12. It is also required to be considered that in the said event, the present informant and the deceased were not involved but the involvement was that of the Sarpanch and the police patel. This would clearly show that the sarpanch and the police patel both had some interest in the land in dispute or some interest in favour of the informant or they may have some interest against the present appellants. Any way, the evidence of the informant in para 16 clearly indicates that the Sarpanch and the police patel had quarrelled with the present appellants and the root cause of the said quarrel was the land which is also said to be the root cause of the occurrence of the present event in which the informant and the brother were allegedly beaten by the appellants.

13. In the above background, we may consider the evidence of informant Khimlabhai Exh.9. He has stated in his evidence that on the date of the incident, he and the deceased both had gone to village Kwant for then sale of their bullocks. That they could not sell them out and, therefore, they were on their way back to their village. That when they reached near Bhuriakuva village, it was about 5 p.m. That the appellants were hiding themselves and they were waiting for the informant and his brother to come there. That as soon as they reached the said spot, the appellants had assaulted both of them. It is also his case that the first appellant had axe with him. The second and third appellant had dharia with them and the fourth appellant had a stick with iron ring, at the time when the incident took place. The informant has further contended in his evidence that he had received injury on his left shoulder as well as on his back. That dharia was inflicted on his left shoulder and stick was inflicted on his back. He has further stated that after he received the injury even the deceased was beaten and he was done to death.

14. So far as the injuries of the deceased are concerned the witness has deposed that the deceased has suffered injuries on his leg as well as on his back and on chest. That these injuries were caused by means of stick. He has further deposed that his brother had sustained axe blow on his leg and he had also sustained dharia blow on his leg. He has further deposed that by and large the injuries were caused to them by means of stick by the present appellants.

15. Then he has further stated that after the aforesaid incident, he had filed FIR and was treated in Kwant Primary Health Centre. Then he was cross examined

on behalf of the appellants. There he has admitted that there are fields of so many persons around the place of the incident. Description has also been given and the witness has clearly deposed in his evidence that there are fields of Kalia Jogi, Magan Lalu, Dhanji Chandu, Shankar Pathalia, Kalia Chema, Karsan and others. This means that so many houses and fields are situated around the scene of the offence. He has also deposed that shouts were raised and on hearing the shouts many persons had rushed to the spot. However, we find that the witnesses who had gathered together on hearing the shouts have not been examined.

16. We can take it that the witnesses at some distance may not have seen the occurrence. Therefore, they may not be in a position to say that they had seen the appellants causing injuries to the informant and his brother. However, they could have said something about the presence of two injured persons and the presence of the appellants. At least they would have been in a position to say that they had seen the appellants running away from the place after the incident was over. However, those witnesses having their houses and fields around the scene of the offence, have not been examined.

17. Then it is required to be considered that according to the evidence of this informant in para 11 after the incident was over and after the appellants had run away from the spot, he had gone to the village and had approached the sarpanch Ranglabhai at his house. He has also deposed that he had told Ranglabhai that he was beaten and even the deceased was also beaten. The witness has further deposed that after conveying the said facts to the Sarpanch, both of them had gone to police patel Jatdabhai. That the aforesaid event was conveyed to the police patel also by him and there he had also told the said police patel that he was beaten and deceased Bachhubhai was also beaten. He has clarified that he had conveyed only these facts to the said witness.

18. This would mean that the informant had an opportunity to convey to these two persons as to what was actually the incident and who was the person involved in the aforesaid offence. In that event, the witness could have conveyed to these two witnesses, that he was beaten by the appellants and that the deceased was actually killed by these appellants. Surprisingly, this witness has not disclosed names of the appellants to these two persons.

It is required to be considered that as said earlier the Sarpanch and the police patel both had beaten the appellants in a quarrel arisen from the aforesaid land which is said to have been purchased by the father of the injured. That shows the interest of Ranglabhai and Jatadbhai in respect of the quarrel over the aforesaid land. In that event, it was quite natural that the informant would convey the names of the appellants to these two witnesses. However, though the witnesses had two opportunities to convey the names of the appellants to the sarpanch and the police patel, the informant has not disclosed the names of the appellants to these two witnesses. No explanation has been tendered by the prosecution showing this sort of conduct of the informant. When an incident takes place and when the informant is said to be an eye witness and when he is also an injured and when he has seen his brother being killed by some persons and if he has opportunity to disclose the names of the assailants and if he does not avail this opportunity, the said factor is required to be considered in light of the background of the fact that there was some dispute between the appellant on one side and informant Ranglabhai and police patel Jatadbhai on the other side.

19. It is also required to be considered that when the informant conveyed the aforesaid facts to the Sarpanch and the police patel, the Sarpanch and the police patel, according to the evidence of this witness, told him that they would enquire about the aforesaid quarrel. Now, if the informant had actually conveyed to these two persons that the appellants had beaten both the brothers, then the Sarpanch and the police patel were not required to enquire or investigate into the matter. This would go to suggest that there was something wrong in the narration of the event either to the police in the FIR or to these two persons to whom the informant had orally conveyed as to how the incident took place.

20. It is required to be noted that the informant had filed FIR on the same date at 8.15 p.m. at the aforesaid Primary Health Centre before PSI. However, the aforesaid fact is totally absent in the said FIR. The prosecution has not further examined or re-examined or cross-examined the informant on the aforesaid aspect of the case. It is true that the aforesaid fact has come on record for the first time during the cross examination of the informant. When new facts have come on record during the cross examination of the informant, it was open to the prosecution and to the learned P.P. incharge of the prosecution to clarify the position. If the prosecution

did not agree with the said fact then some questions could have been placed to the witnesses by way of re-examination. This has not been done. Therefore, the aforesaid evidence of this witness that he had conveyed the aforesaid event to the Sarpanch and police patel remained on record uncontroverted or without challenge. There is no reason to discard the said evidence in toto. The reason is that the sarpanch and the police patel had some interest in favour of the informant and against the appellants. It also appears that these two persons have some interest in the land also and, therefore, it was quite natural that the informant would definitely convey that he and the deceased both were beaten by the appellants and yet the informant did not convey this fact to these two persons and this omission has not been explained either in the FIR or at any other place. Even by way of further examination or re-examination, the fact has not been clarified by the prosecution. This would make it clear that the informant had two earlier opportunities before filing the FIR to disclose the names of the appellants to the sarpanch and police patel who were the persons interested in his favour and yet the informant did not convey to them the names of the assailants. Therefore, when the names of the appellants as assailants have been disclosed for the first time in the FIR, then some sort of doubt will naturally be created in the credibility of this witness.

21. Then so far as police patel and Sarpanch are concerned, at the first point of time, the informant has deposed that they had not accompanied him to police station for filing FIR. Then he clarified that when the FIR was filed these two persons were present. Even the PSI has also deposed that he had seen the Sarpanch in the Primary Health Centre on 30.8.1993. This would further show that the Sarpanch was present when the informant was in the dispensary. Despite the said position, the statement of the Sarpanch has never been recorded by the PSI. It is also required to be considered that this Sarpanch was taken as panch in one of the panchnama by the PSI and he was not taken as a witness though the informant had conveyed something about the happening of the incident. It is further required to be considered that even houses of the appellants were searched by the PSI by keeping the Sarpanch present not as panch but as Sarpanch. On the one hand we have seen that the Sarpanch had some interest against the appellants and they were at criminal litigation also. In view of this, the PSI had no reason to keep the Sarpanch present when the house of the appellants were searched for finding out the weapons and clothes. Therefore, involvement of the Sarpanch

during the course of investigation is also required to be considered in the above background. Even otherwise this Sarpanch was kept as a panch in one of the panchnama. That also shows the involvement of the Sarpanch in the investigation.

22. So far as the investigation is concerned, it is always expected from the Police Investigating Officer that the investigation is always honest and neutral. For having a neutral and honest investigation, the witnesses to be selected are also required to be honest and neutral. If there are interested eye witnesses, then I.O. cannot discard them but when some persons are required to be selected as panch witnesses, then the I.O. can take into consideration as to whether the person to be selected to be panch is really a neutral witness or not. In the present case we find that the Sarpanch was having adverse interest against the appellants. He was a criminal litigant therefore, it was not proper on the part of the PSI to take the Sarpanch as panch at one place and to keep the Sarpanch at the time when the search of the house of the appellants was taken. This involvement of the Sarpanch during the course of investigation at the instance of the PSI also shows doubt on credibility of the investigation in question. Even otherwise, there is a conflict between the evidence of the informant and his FIR. The informant has stated in his FIR that he was taken first to Kwant Primary Health Centre whereas during the course of his cross examination the informant has deposed before the trial court that he first went to the sarpanch and then to the police patel and thereafter he was taken to Kwant Primary Health Centre. This shows that there is material improvement during the course of evidence of this witness. If that is not a contradiction, then at least it may be said that this material aspect has been omitted from his FIR. The fact that the statement of the Sarpanch and the police patel have not been recorded also indicates that the PSI has chosen to keep the Sarpanch present at a couple of occasion in the course of investigation. On the other hand, the PSI has kept away the police patel and the Sarpanch from the sphere of investigation by not recording their statements. Any way, there is a material improvement in the evidence of the informant and the said improvement actually goes and runs contrary to the facts stated in the FIR.

23. It is also required to be considered that at the first stage, the informant disclosed that the FIR was filed at Kwant police station whereas it has come on record that the FIR was recorded by the PSI in the Kwant

Primary Health Centre itself.

Let us not take the above contradiction seriously. Then also it has come on record that the witness has deposed in his cross examination that he had told the police station that he was beaten and his brother Bachhubhai was also beaten. If he had gone and conveyed only this fact to the police station without disclosing names of the appellants, then in that case, it would be a matter of doubt whether the appellants were really present at the time when the incident took place and as to whether the appellants had really caused injuries to the informant and his brother and whether the appellants were really named by the informant.

24. It may be that he had conveyed this fact before the FIR was recorded. Nevertheless it becomes doubtful as to whether the statement made by this witness/informant to the Sarpanch and the police patel and the police station that he and his brother both were beaten was really a true fact or whether the fact stated in the FIR that he and his brother both were beaten is a real fact. Therefore, there are two different probabilities. One probability shows that as per the initial case of the informant at three different places that he and his brother were beaten. On the other hand the other probability touching the FIR shows that he and his brother both were beaten by the present appellants. In view of the background that there was consistent dispute since last 20 years and more between two groups and in view of the fact that the police patel and sarpanch had demonstrated their active personal interest in favour of the informant and/or against the appellants and also in view of the fact that the police patel and sarpanch were at a criminal litigation with the appellants, then it is required to be considered that the learned Advocate for the appellants may be right in arguing that it is probable that the informant and his brother were seriously beaten by someone else and yet at the instance of sarpanch and police patel the names of the appellants were disclosed for the first time at the time when the FIR was recorded by the PSI in Kwant dispensary. This probability cannot be ruled out totally. It is more so, when the probability has been generated during the course of cross examination of the informant himself.

25. It is also required to be considered that the informant has deposed at page 12 of his evidence that the police of Vadodara had taken his statement and his statement was also recorded by Magistrate (Executive). He has further deposed that his first statement was

recorded at Vadodara by the Executive Magistrate. Now this again does not appear to be a correct version, since the FIR is found to have been recorded on 30.8.1993 at about 8.15 p.m. at Kwant Primary Health Centre and then he was shifted to Vadodara and there he was given treatment by the Hospital at Vadodara on 31.8.1993. Therefore, if the FIR was recorded first on 30.8.1993 at Kwant Primary Health Centre, then it cannot be said that his first statement was recorded at Vadodara by the Executive Magistrate. So far as the statement of the informant before the Vadodara police is concerned, the said statement has not been placed along with the police papers. The PSI has demonstrated his ignorance about such a statement of the informant being recorded by the police of Vadodara. However, he has said that had there been such a statement, then Vadodara police would have forwarded the same to the PSI, Kwant. Any way, the evidence of this witness with respect to his statement said to have been recorded by the Vadodara police, is not supported by any other material which would further show that the witness is having a tendency of taking different stands at different point of time. He is also found to be in the habit of changing his versions from time to time. It is further found that during the course of his evidence he has demonstrated improvement on material particulars which may go to the root of the case of the prosecution. Some contradictions have been brought on record during the course of cross examination of witnesses. It seems that the Executive Magistrate at Vadodara had recorded dying declaration of the informant in the hospital at Vadodara. The said Executive Magistrate has not been examined and the dying declaration of the informant recorded by the Executive Magistrate has not been brought on record and has not been proved on record and yet a contradiction has been brought on record to show that the informant has stated something to the Executive Magistrate which has not been deposed by him before the trial court.

26. There the informant has stated that he knows that if two persons quarrel or fight intersay, then it may be treated to be a fight. He has further stated that he has stated to the Executive Magistrate that he had received injury in a fight. This would suggest that there may be a fight between the two groups. This would again be a version of the informant different from his version before the court in chief-examination and in the FIR referred to hereinabove. In para 22 of his evidence the informant has deposed that the police of Vadodara had made some enquiry from him and he was told by the police at Vadodara that the names of the appellants were

disclosed in the investigation and, therefore, as and when he may be required to give statement, then he should name the four appellants. It is true that as per the prosecution case, the FIR was recorded at 8.15 p.m. on 30.8.1993 and the informant reached the hospital at Vadodara at 2.30 a.m. on 31.8.1993. However, this admission on the part of this informant further creates doubts in his testimony and in the investigation itself. If the informant knew that the four appellants were assailants, then Vadodara police was not required to convey to him that the names of the appellants were disclosed in the investigation and, therefore, the informant should name them as and when his statement may be recorded. This means that the learned advocate for the appellants appears to be right in arguing that there is some sort of tutoring by the police to the informant for disclosing the names of the appellants in his statement.

27. PW 2 at Exh.12 Vestabhai is not an eye witness. He simply says that when the fact of incident was conveyed to him, he took the informant to Kwant Primary Health Centre and since there was more injury, he was taken to Vadodara for further treatment. His evidence is not useful for the purpose of ascertaining as to whether the informant and his brother were beaten by the present appellants.

28. In para 3 of his evidence, the witness has deposed that when the police of Kwant had contacted him, the police had prepared a writing and his (of the witness) thumb mark was also obtained on the said writing. Learned Advocate for the appellants has argued that this would be the FIR and it has not come on record. However, this evidence has not been supported by any other material on record. Therefore, it is not possible for this court to hold that Vestabhai had filed FIR in Kwant Primary Health Centre. PW 3 Exh.13 is a brother of the informant. According to his evidence, the incident in question was conveyed to him at his residence by Shankar and, therefore, he went to the spot. That, he found dead body of the deceased lying there and he also found that the informant was lying there. He also found that both of them had injuries on their persons.

29. It is required to be considered that the informant has clearly deposed in his evidence that he had gone to the sarpanch and police patel and, therefore, if he had actually gone to those two persons then he would not be found lying at the place of the offence. Therefore, again on this point, evidence of the informant

and his brother Bhimsingh stands to contradiction. In para 4 of his evidence, he has deposed that he had accompanied the informant to Vadodara and there the police had come to the hospital and had told that four appellants had killed the deceased and had beaten the informant. It is not clear as to how the Vadodara police came to know about the same but the evidence of this witness shows that someone had conveyed it to the police of Vadodara and Vadodara police was required to convey this fact to this witness. Any way, this witness is not a witness to the incident and no eye witness had conveyed him that the appellants were the persons who had caused injuries to the two brothers. Therefore, his evidence is not useful for deciding the issue as to whether the injured and the deceased were beaten by the present appellants.

30. PW 4, Rimjibhai at Exh.14 has also given his evidence in a similar fashion saying that he had accompanied the informant to Kwant Primary Health Centre. His evidence is not useful for the purpose of deciding the above issue. Nasliben Bachhubhai, PW 5 at Exh.15 is the widow of the deceased. She has tried to pose herself as an eye witness to the incident in the chief examination and she has stated that she had seen the four appellants coming after the incident was over. However, she was cross examined at length. There also she denied that she was at her residence when the incident took place. However, it was brought on record that as per her case, she was at her residence and there the information was conveyed about the incident in question. Therefore, she along with other persons had gone to the spot. Any way, as per the prosecution case, she was not a witness to the incident in question and even if she poses herself to be an eye witness for the first time at the trial contrary to her police statement, it is not acceptable to this Court, that this widow of the deceased was a witness to the incident. Therefore, her evidence that she had seen the appellants running away after the incident, cannot be relied upon.

31. PW 6, Kaliabhai at Exh.16 has turned hostile and he was cross examined on behalf of the prosecution. As per the prosecution case, he was an eye witness. However, he has clearly deposed that he had not seen the incident and had not seen the appellants causing injuries to the informant and his brother. He simply says that when he reached the place of the incident, he found that the deceased was lying on the ground. This witness was cross examined by the learned Public Prosecutor incharge of the prosecution. However, nothing could be derived

from the said cross examination. PW 7 Karsanbhai at Exh.17 has been examined as an eye witness. It is required to be noted here that the trial court, while appreciating the evidence of this witness, has found that this witness is not a trustworthy witness and, therefore, he cannot be relied upon. The trial court has accordingly, not relied upon the evidence of this witness. However, we are required to deal with an appeal filed by the appellants and when the conviction has been challenged by the appellants it may be proper for us to consider the evidence of this witness at least in a brief manner.

32. As per the evidence of this witness he had seen the appellants causing injuries to the injured informant as well as his brother. He has also given details as to how the injuries were caused. It is required to be considered that as per the evidence of this witness, the deceased received one injury near his ear. However, such an injury has not been noticed on the person when the post mortem was undertaken. This witness has also deposed that there were some injuries caused by means of stick on the chest of the deceased by appellant No.4. However, these injuries have not been noticed on the person of the deceased during the post mortem undertaken by the concerned Doctor. This witness has been cross examined at length and he has given details as to the distance between different localities and from the said evidence, it becomes difficult to accept that this witness was present when the incident took place.

33. According to this witness, Village Sedivasan has 7 to 8 different localities and interse distance is of 2 to 3 kms. between those localities. He has further deposed that the deceased was staying in Jankhan falia locality. That the incident took place in Bhuriakuva village and there is a distance of about 3 kms. between the two places. If that is true, then the members of the family of the informant could not have rushed to the spot so soon, after crossing a distance of 3 kms. The witness has also deposed that the incident took place at the time when monsoon was in full spring. That labourers and agriculturists were working in their respective fields around the spot of the incident. He had also deposed that other persons had also reached the spot.

34. In para 11 of his cross examination, this witness has deposed that one Dhanji is the Kotwal in the village and injured Himlabhai is the son of the Kotwal. It does not appear to be true. Name of the father of Himlabhai is not Dhanji but Karsanbhai. There is no doubt about

the same. It seems that the father of the injured is the uncle of this witness and the sarpanch Ranglabhai is also an uncle of this witness. Even police patel is also an uncle of this witness. This means that this witness is closely related to the father of the injured, sarpanch and the police patel.

35. This would further show the close relationship between the father of the injured, sarpanch and the police patel. Above material disclosed in para 11 of this witness establishes that there is a close blood relationship between the informant and the police patel and the sarpanch and even this witness shares the said relationship with those persons. A suggestion was made in para 12 of his cross examination that the disputed land goes to his share. The witness has denied the said suggestion but the way in which the sarpanch and the police patel have taken interest in the matter and the way in which the sarpanch and the police patel had beaten the appellants in the past, requiring them to undergo hospitalisation for a period of 10 days clearly indicates that there is a close relationship between the informant, sarpanch, police patel and this witness also. Therefore, it may be that the witness may have some interest in the land in question. This probably cannot be ruled out and, therefore, the trial court was justified in holding the evidence of this witness is not trustworthy and, therefore, it cannot be relied upon. Even evidence about the timings given in the evidence of this witness is contradictory. Though he had stated to the police that he had returned by 4 to 5 pm, he had deposed before the Court that he had returned by 4 p.m. This seems to have been deposed by him with a view to suit the timings given by the injured/informant about the occurrence of the incident. If the informant has said that the incident took place at 4 p.m. and if the witness says that he had come there at 5 p.m. then no eye witness would be present at the time when the witness reached there. Therefore, with a view to overcome the said difficulty, the witness has changed his version to suit the version of the prosecution case and, therefore, he has said that he had returned to the village by about 4 p.m. If a witness loses his memory and on account of the said loss of memory, he says something different from the actual occurrence, then the said omission can be pardoned without any difficulty but when the witness changes his version with a view to suit the version of the prosecution case, then the witness can be treated to be a clever witness who may be able to change his version to suit the main stream. In that event, the evidence of such a witness is required to be appreciated with extra

caution. The witness has deposed at para 14 that the informant had never gone to inform anybody but it was he who had gone to convey the event to the members of the family of the informant. Here his evidence stands contradicted by the evidence of informant who has clearly deposed that soon after the occurrence, he had gone to the village and had contacted the sarpanch and police patel and had conveyed that he and the deceased both were beaten. So evidence of this witness stands contradicted by the evidence of the informant.

36. When an enquiry was made from him during the course of cross examination as to whether he had any idea as to why the incident took place, he has disclosed that he has not told the police as to what the cause was. However, it has come on record that he has stated to the police during the course of his statement recorded under section 161 of the Code that there was dispute regarding land and it was the cause of the quarrel in question. This means that though the witness knew about the quarrel and cause of the quarrel, he cleverly made an attempt to keep himself away from the said cause of quarrel which would further show that he may be interested in the land in question and, therefore, he may have tried to keep him away from the issue of cause of quarrel. It is also required to be considered that this witness has further deposed in the police statement recorded under section 161 of the Code that there was a quarrel between the two groups on account of the land and there was police case in past also. The trial court has appreciated evidence of this witness and in so doing the trial court was not unjustified in not relying upon this evidence of the witness. We, therefore, agree with the findings and reasonings of the trial court. Therefore, it would not be necessary to go into further discussion with respect to the evidence of this witness.

37. PW 10 - Karsanbhai Motibhai is father of the injured and the deceased. He was at his residence and according to his evidence, Karsanbhai Karpas had come to his residence and he was told that his son was killed. Therefore, he went to the spot and found that the informant had received injuries and the deceased had already died. Now at that time, as per the evidence of the witness, witness Karsanbhai Karpas only told him that his son was killed. However, at that point of time, as per the evidence of this witness, it was not known to him that his son was killed by the present appellants. At the bottom of the chief examination, the witness has deposed that deceased Bachhubhai Rathwa was killed in a land dispute and the appellants present in the court were

the persons who had killed the deceased. He has further deposed that he came to know at the instance of Karsanbhai Karpa that the appellants had killed the deceased. At the same time, he has not said as to who had beaten the informant. If Karsan Karpa was a witness to the incident and if he had told this witness that the appellants had killed the deceased and had beaten the informant then both the facts would have been there in the examination of this witness. However, so far as the injuries to the informant are concerned, it seems that the witness Karsanbhai Karpa did not inform this witness that the appellants had beaten the injured also. In cross examination, this witness has deposed that his statement was recorded on the day after the dead body was received for funeral. The witness further says that the police had come to him and had conveyed to him that the names of the appellants were disclosed and Karsanbhai Karpa was required to be shown as "got-up" witness. He has further deposed that the statement of Karsan Karpa was recorded on the next day after recording of his statement.

38. So according to the evidence of the father of the injured and the deceased, the police had conveyed to him that Karsanbhai Karpa was required to be shown as a 'got-up' witness. This would further throw light on the evidence of Karsanbhai Karpa which has not been believed by the trial court. When this evidence has come on record through cross examination of the father of the injured and the deceased and when the fact was not true, then the prosecution could have re-examined the witness, on this aspect of the case, in order to bring the truth, if whatever stated by the witness in cross examination was not true. Despite clear evidence given by this witness in cross examination that the police had told him that Karsanbhai Karpa was required to be posed as 'got-up' witness, the prosecution has not clarified the position and, therefore, the above version of this witness has remained unchanged and uncontroverted in evidence and, therefore, it would be difficult to discard the said evidence given by the father of the deceased and the injured. It is true that as per the case of the prosecution the statements of witnesses were recorded on 30th itself and not on 31st of August or first of September. Nevertheless, the witness deposes that before recording his statement, the above fact was conveyed by the police. It may be that the above fact was conveyed by the police to this witness on 30th August itself. In other words, according to the case of this witness, before the police had recorded his statement under section 161 of the Code, the police had instructed him

that the name of Karsanbhai Karpas was required to be posed as a 'got-up' witness. If Karsanbhai Karpas is a 'got-up' witness and if his evidence is not accepted as trustworthy and reliable, then on the one hand the evidence of informant does not get corroboration from the evidence of Karsanbhai Karpabhai, on the other hand, the prosecution or investigation Agency has introduced this witness as eye witness to the said incident, in that case, the investigation cannot be said to be fair and honest investigation.

39. Merely because the investigation is not fair and honest, the evidence of reliable witness may not be required to be thrown away but when it is noticed that the witness has been introduced as eye witness to support the evidence on a solitary eye witness, then in that event, the evidence of such witness subsequently introduced as eye witness may not be discarded. But the manner in which he has been introduced as an important eye witness, it would also adversely affect the interest of the prosecution. Here it is required to be considered that Karsan Motibhai at exh.24 is not a stranger. He is the father of the informant and even the deceased was also his son. The property in question was purchased by him. Therefore, he had interest in favour of the deceased and against the appellants. Despite the above position, this witness has clearly deposed that before recording the statement, he was told by the police to introduce Karsan Karpabhai as a 'got-up' witness. When such a witness has admitted in his evidence that Karsan Karpas was required to be introduced as a 'got-up' witness, then the evidence of this witness will certainly get an extra weightage over other witnesses.

40. Karsan Dalubhai, PW 11 Exh.33 is a witness in whose presence the panchnama of scene of offence was drawn by the Investigating Police Officer. It is required to be considered that sarpanch Ranglabhai was co-panch. However, he has not been examined. As stated earlier, the sarpanch had interest against the appellants and the sarpanch was involved in criminal litigation with the appellants and yet he has been introduced as panch witness which also shows that the investigation in question is not totally fair and impartial.

41. PW 12 Natubhai Jaimalbhai, at Exh.35 is also a panch witness. It seems that according to the prosecution, house of the appellants was searched in his presence and blood stained dharis and axe were seized from the said house. However, the witness had turned hostile. He has not supported the said version of the

prosecution. This witness has also stated that sarpanch Ranglabhai was not present. However, PSI himself has deposed that the sarpanch was present when the house of the appellants was searched. PW 13 Exh. 37 is a co-panch witness. He has also turned hostile and he has denied that muddamal weapons stained with blood were seized from the house of the appellants. PW 13, Exh.38 is also a panch witness. According to the case of the prosecution, two appellants had presented themselves at Chhota Udepur police station with blood stained dharia and they were arrested and the muddamal was seized. This witness has denied this fact and has stated that the above seizure did not take place in his presence. Kanabhai Nayak at Exh.40 is also a panch witness of Chhota Udepur. He has been treated as hostile.

42. PW 16 at Exh.42 is a panch witness of the discovery panchnama. According to the prosecution, appellant No.4 had produced stick and it was seized by the police. This witness has turned hostile and he has not supported this version of the prosecution. Therefore, the said fact has not been proved through the evidence of this witness. Then there is evidence of PSI at Exh.44. He has first said that informant had come to him and the FIR was recorded by him. He has then deposed that a telephonic message was received from the Primary Health Centre, Kwant that a person had come in injured condition and, therefore, he went to the Primary Health Centre and recorded FIR of the informant. He has also deposed that blood stained clothes and weapons were seized from the house of the appellants. However, the panch witness has not supported the said version of the said witness. Moreover, the witness has also agreed that the sarpanch was present when the above search was undertaken. The sarpanch is not a panch to the panchnama of search and seizure. Still he was kept present. It is required to be noted that the sarpanch has adverse interest against the appellants and yet he was kept present when the search and seizure which has thrown light on the conduct of the Investigating Agency. If the sarpanch was neutral and if he was kept present, then things would have been different. If the Sarpanch had some interest against the appellants and when the criminal case was pending, then in that event, it was not very much proper on the part of the Investigating Agency to keep the sarpanch present at the time of search and seizure in question. The prosecution has proved the contradiction in the evidence through this witness. On the other hand, the defence has proved the contradiction between the evidence of the informant and his statement recorded by the Executive Magistrate as dying

declaration. As said earlier, it was not open to the defence to bring the said contradiction on record without examination of the Executive Magistrate and without producing the statement of the informant. It is required to be considered that though Karsan Karpa has been projected as material eye witness, the informant never declared this witness as eye witness in his evidence before the trial court or in his FIR that Karsan Karpa was seen coming to the spot when the incident was going on.

43. Even the contradictions with respect to the other witnesses have also been brought on record through cross examination of this witness. This witness has stated that the statements of all the witnesses were recorded before 12 midnight on 30.8.1993. However, he has further deposed that statement of Ganyabhai was recorded in more than 1.75 pages, that the statement of Vestabhai was recorded in more than one page, that statement of Kadia Jogi was recorded in one and half pages, statement of Shankar Pathalia was recorded in more than one page, statement of Bhimsingh was recorded in two pages, statement of Karsan Karpa was recorded in two and half pages, statement of widow of deceased Nasliben was recorded in two pages, statement of Karsan Motibhai was recorded in more than three pages, statement of Dichaliben was recorded in more than two and half pages, statement of Dholiben was recorded in nearly two pages, that statement of Rimji was recorded in one and half pages. The I.O. recorded FIR at 8.15 p.m. at Kwant Primary Health Centre. Thereafter the FIR was sent for registering at the police station and thereafter the investigation had started. If thereafter the PSI had reached the spot at a distance of 7 kms, then, it is not probable that the statements of these witnesses at the above length could be concluded before 12 midnight. This witness has definitely said that after 12 midnight, day would change. He has stated that all the 14 witnesses have given their statements before midnight. This is not probable looking to the length of the statement given by those 14 witnesses.

44. An attempt was made on behalf of the appellants that though the FIR was lodged at 8.15 p.m. on 30.8.1993 as per the case of the prosecution, the FIR did not reach the court of the JMFC on 31.8.1993 and it had reached there on 1.9.1993, The learned trial Judge has considered this aspect and has observed that there was public holiday on 31.8.1993, and therefore, the FIR could have reached on 1.9.1993. We may not dispute the said position and, therefore, we agree that because of a

public holiday, the FIR may have been received by the Magistrate concerned on 1.9.1993.

45. A suggestion was put to the PSI that the sarpanch and the Police patel both were moving with the PSI at the time of investigation. This suggestion was negatived by the witness but the fact remains that the sarpanch was invited as a panch when the panchnama of the scene of offence was drawn on the next morning. It is a matter of record that the sarpanch was kept present when the house of the appellants were searched. Therefore, it appears that the sarpanch had taken some interest in the investigation and the PSI has also allowed the sarpanch to take such interest in the investigation, despite the fact that it was within the knowledge and notice of the Kwant police that the sarpanch and police patel were having criminal litigation with the appellants and the appellants were beaten and on account of that the appellants were required to be hospitalised for 10 days.

46. On appreciation of evidence as aforesaid, it is clear that the informant injured had at least three opportunities to disclose the names of the appellants. At first the opportunity was with the sarpanch and the second opportunity was with the police patel and the third opportunity was with the persons who had gathered together after hearing his shouts. All the opportunities available to the informant has not been highlighted by the informant in the FIR. This would further show that the FIR was lodged with a view to avoid introduction of sarpanch and police patel as witnesses to whom the incident was first reported. If some cleverness is demonstrated in the course of the investigation and particularly right from the inception of the FIR then in that case, it can be said that the such a cleverness on the part of the witness may lead to contravention in evidence given by the witnesses. If the informant had at least three opportunities for the disclosure of the names of the witnesses and the names of the appellants and if he had not disclosed the same in the FIR, it is difficult to believe that the appellants were present there at the time when the incident took place and have inflicted blows on the deceased as well as on the injured. Considering the probability of receiving the injuries at the hands of some other persons and introducing the names of the appellants on account of personal rivalry because of the aforesaid involvement of police patel and sarpanch and considering the way in which his evidence of Karsan Karpa was recorded and the way in which is evidence has been described by the trial court and the alleged interest of Karsan Karpa in the land in dispute, all

these things collectively go to show that father of the informant may be right in saying that before his statement was recorded, he was told to introduce or to pose Karsan Karpa as an eye witness. When the witness has been introduced as a got-up witness, at the instance of the Police Investigating Agency or someone else, the result will be that it would be difficult to place reliance on the informant himself. In view of the above position, if the informant himself is not found to be trustworthy then there is absolutely no evidence on record to say that the appellants were present and were involved in the offence. The FIR cannot be used as a substantive piece of evidence. The FIR is an corroborative piece of evidence which may corroborate the testimony of the person who has filed FIR. However, if the person who has filed FIR is not found to be trustworthy and reliable, then the prosecution cannot be permitted to argue that the FIR may be used as substantive piece of evidence. So on the one hand the informant is found not trustworthy and reliable and the FIR cannot be used as substantive piece of evidence, on the other hand, evidence of Karsan Karpa, the only remaining eye witness has not been treated to be an eye witness and his evidence is not accepted by the trial court also. One eye witness has turned hostile. There is no evidence on record to show that the appellants were present at the time when the incident took place and the appellants have inflicted blows to the informant and the deceased and intentionally killed the deceased and caused serious injuries to the injured. Therefore, once we find that the informant is not a reliable witness, then the only alternative left to us is to hold that the prosecution has failed to prove the case beyond any reasonable doubt. Therefore, the appellants are entitled to benefit of reasonable doubt. It is true that the trial court has given extra weightage to the evidence of the informant. However, we find that the trial court has not properly considered the evidence of the informant considering the fact that the witness had three opportunities to disclose the names of the appellants before the sarpanch or before the persons gathered there. He did not avail the said opportunities. When Karsan Karpa has been shown to be a 'got-up' witness, even according to the case and evidence of the father of the informant himself, then the entire investigation may be treated to be not genuine and it shows lack of honesty and when the FIR has been registered in the above background, then it is difficult to accept that the informant had really filed the aforesaid FIR disclosing the names of the four appellants at 8.15 p.m. on 30.8.1993. In that case, even the FIR cannot be treated

to be a bonafide and genuine FIR.

47. In above view of the matter, when we found that the trial court has not properly appreciated the evidence of the informant, it is also required to be considered that though the informant had first contacted the sarpanch and the police patel and though the said two persons were involved in earlier criminal litigation in which they had assaulted and beaten the appellants and on account of which the appellants were required to be hospitalised for about 10 days, as per the say of the prosecution witness, despite the fact that the I.O. knew about the previous litigation between the two groups, the I.O. has failed to record the statement of the sarpanch as well as the police patel. The I.O. has not assigned any explanation for not recording the statement of those witnesses. It is also required to be considered that no further investigation was undertaken despite the fact that there was previous litigation between the two groups. The I.O. could have brought the said materials on record in order to show the role played by the sarpanch and the police patel in earlier litigation. It is more so when the injured and the deceased had blood relation with the sarpanch and police patel with the eye witness Karsan Karpa. It is also required to be considered that when the fact of cognizable offence involving murder of the deceased and serious injuries received by the injured has been brought by the relative of the police patel, then the police patel would naturally record the same in his own diary. In the present case the informant had conveyed the above fact to the police patel before lodging FIR and if the police patel had recorded the same in his diary, then it would have lent some support to the prosecution case. The Police Investigating Officer has not recorded statements of police patel and therefore, it is not clear as to whether such a statement was made to the police patel by the informant and whether the police patel has made any entry in his record. Therefore, by non-examination of the police patel by the I.O. under section 161 of the Code, the I.O. has lost an opportunity of bringing a very material piece of evidence in the form of statement of the informant to the police patel soon after the occurrence of the incident itself. Therefore, on the one hand, non-examination of the aforesaid two witnesses has materially prejudiced the case of the prosecution, on the other hand, non-examination of police patel has further prejudiced the case of the defence on the point as to what was the real fact conveyed by the informant to the police patel. Had it been recorded in right perspective, then the opportunity would have no defence to advance

before the trial court since it would have been the first statement of fact given by the informant to the police patel which may have been reduced into writing by the police patel in his official capacity as a police patel of the village. The prosecution has, therefore, failed to bring home charge against the appellant by not producing the said material on record. Any way, we find that the trial court was not justified in depending upon the sole testimony of the injured eye witness/informant and once it is found that the evidence of the informant is not reliable, then there being no other evidence on record of evidence, it has to be accepted that the case against the appellant has not been proved beyond reasonable doubt and, therefore, the appellants would be entitled to a benefit of the said reasonable doubt.

48. For the foregoing reasons, we are of the view that the trial court has committed serious error in holding that the appellants were the persons guilty of having caused grievous hurt to the injured and of having caused murder of the deceased and by convicting them for the offence under sections 302, 326 and 34 of IPC read with section 135 of the Bombay Police Act. That being the position, the appeal is required to be allowed and the judgment and conviction order are required to be set aside.

49. For the foregoing reasons, this appeal is allowed. The impugned judgment and conviction order recorded by the learned Addl. Sessions Judge, Vadodara, Camp at Chhota Udepur dated 21.7.1995 in Sessions Case No.21 of 1994 convicting the appellants for offences punishable under sections 302, 326 read with section 34 of IPC and section 37(1) read with section 135 of the Bombay Police Act are set aside. The appellants are ordered to be acquitted of the offences punishable under sections 302, 326 read with section 34 of IPC and under section 37(1) read with section 135 of the Bombay Police Act. It seems that appellants no.2 and 4 are in jail at present. They shall be set at liberty forthwith, if no longer required in any other case. Their bail bonds stand cancelled.

Appellants No.1 and 3 are reported to be absconding. However, they are also ordered to be acquitted as per the above order.

We do not disturb the order of the trial court with respect to disposal of the muddamal articles since the said part of the order is not challenged during the course of argument by the learned Advocate for the

appellants.

[D K Trivedi, J.]

[D P Buch, J.]

msp

22.1.2004